

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
	:	
v.	:	
	:	
KENNETH FAISON	:	
	:	
Appellant	:	No. 1905 EDA 2018

Appeal from the Judgment of Sentence Entered May 25, 2018
In the Court of Common Pleas of Montgomery County Criminal Division
at No(s): CP-46-CR-0003370-2016

BEFORE: BENDER, P.J.E., DUBOW, J., and COLINS, J.*

MEMORANDUM BY COLINS, J.:

FILED OCTOBER 29, 2019

Appellant, Kenneth Faison, appeals from the judgment of sentence of five to ten years of confinement, which was imposed pursuant to his conviction for persons not to possess firearms.¹ We affirm.

On February 2, 2016, Officer Michael Watts of the Plymouth Township Police Department responded to a report of a robbery at American Gasoline and reviewed surveillance footage from the gas station. N.T., 3/15/2017, at 40-43. At trial, two still images from the surveillance footage were admitted into evidence as Exhibits C-10 and C-11. Sergeant Douglas Copestick of the Plymouth Township Police Department testified that Exhibit C-10 showed that,

* Retired Senior Judge assigned to the Superior Court.

¹ 18 Pa.C.S. § 6105(a)(1).

“in [the suspect’s] left hand he presents a small black pistol as he approaches the cashier.” N.T., 3/16/2017, at 27. He continued that Exhibit C-11 showed the suspect “putting the black pistol back into his jacket pocket.” **Id.** When these exhibits were published to the jury, Sergeant Copestick used a pointer to indicate a “black object, which we believe is a gun” in Exhibit C-10. **Id.** When Exhibit C-11 was published, the sergeant told the jury, “You can see the barrel here and the fact that there’s no external hammer on the gun as he’s placing it back into his pocket.” **Id.** at 28. Sergeant Copestick further testified that Appellant is left-handed. **Id.**

On March 16, 2017, a jury acquitted Appellant of robbery, theft, and firearms not to be carried without a license. Pursuant to an agreement of the parties, a separate charge of persons not to possess firearms had been bifurcated from the other counts, so that the jury would not be aware of Appellant’s prior criminal history. Appellant also agreed that the verdict for this count would be determined by the trial court and not by a jury, and the trial court found Appellant guilty of persons not to possess firearms. On May 25, 2018, Appellant was sentenced to five to ten years of confinement. Appellant filed a post-sentence motion, which was denied on June 4, 2018. On July 3, 2018, Appellant filed this timely direct appeal.²

Appellant presents the following issue for our review:

² Appellant filed his statement of errors complained of on appeal on August 16, 2018. The trial court entered its opinion on February 6, 2019.

Whether the trial court erred in denying Appellant's Motion for Acquittal on the bifurcated charge of Person Not to Possess a Firearm in docket CP-46-CR-3307-2016 because the evidence was insufficient and not of sufficient weight to show [A]ppellant was the perpetrator and possessed a gun, or replica of a gun, beyond a reasonable doubt, and the jury acquitted [A]ppellant of all remaining charges?

Appellant's Brief at 8.

Appellant challenges the sufficiency of the evidence.³ Appellant's Brief at 48-49.

This Court's standard for reviewing sufficiency of the evidence claims is as follows:

We must determine whether the evidence admitted at trial, and all reasonable inferences drawn therefrom, when viewed in a light most favorable to the Commonwealth as verdict winner, support the conviction beyond a reasonable doubt. Where there is sufficient evidence to enable the trier of fact to find every element of the crime has been established beyond a reasonable doubt, the sufficiency of the evidence claim must fail.

The evidence established at trial need not preclude every possibility of innocence and the fact-finder is free to believe all, part, or none of the evidence presented. It is not within the province of this Court to re-weigh the evidence and substitute our judgment for that of the fact-finder. The Commonwealth's burden may be met by wholly circumstantial evidence and any doubt about the defendant's guilt is to be resolved by the fact-finder unless the evidence is so weak and inconclusive that, as a matter of law, no probability of fact can be drawn from the combined circumstances.

³ Despite Appellant's statement of questions involved stating that the verdict was "not of sufficient weight[,]" Appellant's Brief at 8, Appellant does not challenge the weight of the evidence in the "Argument" section of his brief. ***Id.*** at 48-49.

Commonwealth v. Rodriguez, 141 A.3d 523, 525 (Pa.Super. 2016) (quoting **Commonwealth v. Tarrach**, 42 A.3d 342, 345 (Pa.Super. 2012)).

Commonwealth v. Izurieta, 171 A.3d 803, 806 (Pa. Super. 2017) (internal brackets omitted).

Appellant contends that the evidence was insufficient to convict him of the aforementioned charges, because the trial court misconstrued the content of the surveillance footage, including whether it showed that the perpetrator was holding a firearm. Appellant's Brief at 48. In doing so, Appellant is requesting that we "re-weigh the evidence and substitute our judgment for that of the fact-finder[,]" which we cannot and will not do. **Izurieta**, 171 A.3d at 806. "[A]ny doubts" regarding the content of the surveillance video were "to be resolved" by the "fact-finder" and not by this Court, *id.*, and the trial court as fact-finder agreed with the Sergeant Copestick's interpretation that the footage showed that a left-handed perpetrator approached the cashier holding a small, black firearm, which the suspect then put in his jacket pocket. Exhibits C-10 and C-11; N.T., 3/16/2017, at 27-28.

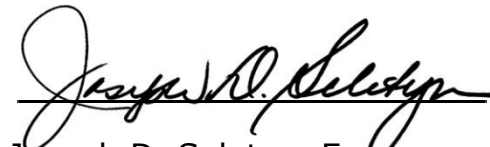
As for Appellant's contention that his conviction is somehow inconsistent when "the jury acquitted [him] of all remaining charges[,]" Appellant's Brief at 48, we note that his case was bifurcated, with the charge for persons not to possess firearms separated from the other counts and given an independent bench trial. In proceeding with a bifurcated trial, Appellant carried the risk that the jury and the trial court could reach inconsistent verdicts, and inconsistent verdicts are permissible in Pennsylvania. **See Commonwealth**

v. Miller, 35 A.3d 1206, 1208, 1213 (Pa. 2012) (“inconsistent verdicts . . . are allowed to stand so long as the evidence is sufficient to support the conviction”; “an acquittal cannot be interpreted as a specific finding in relation to some of the evidence, and that even where two verdicts are logically inconsistent, such inconsistency alone cannot be grounds for a new trial or for reversal”; “the ‘special weight’ afforded the fact of an acquittal plays no role in the analysis of inconsistent verdicts, because, by definition, one of the verdicts will always be an acquittal”); **Commonwealth v. States**, 938 A.2d 1016, 1025 (Pa. 2007) (bifurcated trials “naturally produce[] the potential for inconsistent verdicts, which . . . do not pose a problem in this Commonwealth”).

Based on the foregoing, Appellant is not entitled to relief. Accordingly, we affirm Appellant’s judgment of sentence.

Judgment of sentence affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 10/29/19